65

Supreme Court, U.S.
FILED

No. 07- 07-300 SEP - 4 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES F. GREVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHELLY B. KULWIN
KULWIN, MASCIOPINTO
& KULWIN, LLP
161 North Clark Street
Suite 2500
Chicago, IL 60601
(312) 641-0300

Attorneys for Petitioner

210849

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Petitioner-taxpayer James Greve (Greve) was indicted for filing false federal personal and corporate income tax returns. The district court denied Greve's pre-trial motions to suppress evidence, to obtain discovery and to conduct an evidentiary suppression hearing. The Seventh Circuit affirmed the district court's order denying Greve's pre-trial suppression motions notwithstanding the fact that Greve presented preliminary, yet specific, detailed, material factual allegations, all of which were un-rebutted by the government and thus deemed true, that the Internal Revenue Service (IRS) violated his Fourth and Fifth Amendment constitutional rights by conducting a bad-faith deceptive criminal investigation of him under the guise of a civil tax audit in which it procured statements and documents from him and other third-parties after obtaining sufficient firm indications of criminal fraud to require constitutionally the IRS to cease its civil investigation activities. Greve's motions for discovery and an evidentiary suppression hearing were denied based upon a presumption that the IRS acted in good-faith during the course of the audit despite the fact that a substantial factual dispute existed between the parties regarding the nature of the IRS' intent and motivation in conducting the investigation.

Two questions are presented:

1. Whether the IRS violates a taxpayer's Fourth and Fifth Amendment constitutional rights during the course of a civil tax audit by continuing its civil audit activities after discovering substantial firm indications of criminal fraud, beginning to prepare the investigation for referral to the IRS' criminal division and affirmatively misrepresenting to the taxpayer the criminal nature of the investigation in order to coerce the taxpayer into providing statements and documents to further the investigation?

2. Whether a taxpayer is entitled to obtain discovery and an evidentiary suppression hearing to determine whether the IRS violated his constitutional rights by conducting a criminal investigation under the guise of a civil tax audit where a substantial factual dispute existed between the parties regarding the nature of the IRS' intent and motivation in conducting the investigation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vi

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION ... 6

I. REVIEW IS WARRANTED TO ARTICULATE A CLEAR STANDARD CONCERNING WHEN THE IRS DURING THE COURSE OF A CIVIL TAX AUDIT VIOLATES TAXPAYERS' FOURTH AND FIFTH AMENDMENT CONSTITUTIONAL RIGHTS. 9

Contents

Page

II. REVIEW IS WARRANTED TO ARTICULATE A CLEAR STANDARD CONCERNING WHEN A DEFENDANT IS ENTITLED TO DISCOVERY AND AN EVIDENTIARY SUPPRESSION HEARING. 14

CONCLUSION 17

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided June 4, 2007 ..... 1a

Appendix B — Decision Of The United States District Court For The Northern District Of Illinois, Western Division Decided December 12, 2005 ..... 12a

TABLE OF CITED AUTHORITIES

Page

CASES:

Beckwith v. U.S.,
425 U.S. 341 (1976) 12

U.S. v. Genser,
595 F.2d 146 (3rd Cir. 1979) 16

U.S. v. LaSalle National Bank,
437 U.S. 298 (1978) 9, 15

U.S. v. Mathurin,
148 F.3d 68 (2nd Dist. 1998) 14

U.S. v. Millman,
822 F.2d 305 (2nd Dist. 1987) 16

U.S. v. Nuth,
609 F.2d 228 (5th Cir. 1979) 10

U.S. v. Peters
153 F.3d 445 (7th Cir. 1998) 9, 10, 15

U.S. v. Pettigrew,
468 F.3d 626 (10th Cir. 2006) 14

U.S. v. Quoc Viet Hoang,
486 F.3d 1156 (9th Cir. 2007) 14

Cited Authorities

Page

U.S. v. Randle,
966 F.2d 1209 (7th Cir.1992) 14

U.S. v. Rollins,
862 F.2d 1282 (7th Cir.1989) 14

U.S. v. Tweel,
550 F.2d 297 (5th Cir. 1977) 9, 10, 12, 13

U.S. v. Utecht,
238 F.3d 882 (7th Cir. 2001) 9, 14

U.S. v. Voigt,
89 F.3d 1050 (3rd Dist. 1996) 15-16

Wong Sun v. U.S.,
371 U.S. 471 (1963) 12

UNITED STATES CONSTITUTION:

Fourth Amendment ..... *passim*

Fifth Amendment .....*passim*

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. James Greve*, 490 F.3d 566 (7th Cir. 2007). The Seventh Circuit affirmed the December 12, 2005, decision of the United States District Court for the Northern District, Western Division, of Illinois. *See* Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Seventh Circuit's opinion was issued on June 4, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMEND. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMEND. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

> the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner-taxpayer James Greve (Greve) was indicted for filing false federal personal and corporate income tax returns arising out of the manner in which he reported income he received from the operation of his family snow plowing business. The indictment grew out of an Internal Revenue Service (IRS) civil tax audit of the Greves' 1997 federal income tax return.

During the course of the criminal case, the government produced its Federal Rule of Criminal Procedure Rule 16 disclosures which contained preliminary, yet specific, facts establishing that the IRS, in violation of Greve's Fourth Amendment right to be free from unreasonable searches and seizures, and his Fifth Amendment constitutional right against self-incrimination, conducted an unconstitutional criminal investigation of Greve, by obtaining statements and documents from him, and other third-parties, under the guise of a civil tax audit.

Specifically, the government's Rule 16 disclosures established that the IRS engaged in serious constitutional violations during its civil tax audit of Greve all of which have repeatedly been held as sufficiently unconstitutional to

warrant either dismissal of criminal tax fraud indictments based upon the evidence obtained through bad-faith deceptive investigations, suppression of the evidence obtained by the IRS during such investigations or, at a minimum, an evidentiary suppression hearing to determine whether the IRS, in fact, committed constitutional violations during the course of its investigation including, among other things, evidence that the IRS made affirmative misrepresentations of the nature of the audit, deceptively responded to direct inquiries about the nature of that investigation, falsely promised a civil resolution of the audit in return for the unwitting and thus involuntary waiver of constitutional rights and employing administrative measures to obtain third-party documents long after it abandoned any civil purpose for requesting such documents.

Here, the IRS continued its civil audit activities notwithstanding the fact that it had substantial firm indications of criminal fraud including, among other things:

> Greve provided the IRS revenue agent (RA) conducting the civil audit an inherently unbelievable and incredible explanation for failing to report substantial business income that he received from his customers.
>
> The RA determined almost immediately after beginning her civil audit that Greve kept "inadequate" books and records, to the extent he maintained any at all, employed "unacceptable" accounting procedures, failed to provide to her all of the material she had requested during the audit and had, in fact, given her fraudulent (*i.e.*, altered) documents, had "several" large cash

transactions, had hidden bank accounts, and had transferred his home into trust following the inception of the IRS audit.

The IRS conducted its civil audit activities at the specific direction of the IRS' District Fraud Coordinator who discussed with the RA the specific next steps the RA needed to take to make the criminal fraud case against Greve and to refer the case for criminal prosecution including, among other things, expanding the audit to include the other tax years and obtaining supporting documentation to help build a three year pattern of fraud required to support a criminal referral; using tools that could be employed to find other hidden accounts where additional unreported income might be located; initiating interviews of, and sending administrative summons to, third parties in an effort to locate other potential unreported income; and checking suspected fraudulent documents received from Greve against original source documents. The IRS' District Fraud Coordinator also provided the RA during the course of the purported civil audit with instructions on how to fill out a "Civil Fraud Penalty Monitoring Form" which is used "in all cases involving (1) Examination Fraud Referral to Criminal Investigation Division; and (2) Criminal Investigation Generated Case." To further establish that the IRS was, in fact, conducting an unconstitutional criminal investigation of Greve under the guise of a civil audit, the RA, while continuing her civil audit activities, downloaded the IRS Manual's procedures for making a criminal fraud referral and set appointments to write up the referral of Greve to the IRS criminal investigation division.

During her investigation, the RA made affirmative misrepresentations of the nature of the audit to Greve and

his attorney in order to obtain Greve's involuntary and thus unwitting waiver of his constitutional rights including, among other things, falsely advising Greve that, once he and others provided to her the documents she was seeking, she would determine his tax liability and "conclude the audit," that the audit would be "done," and "wrapped up pretty quickly," and further indicated that no criminal referral was being considered while she was, in fact, simultaneously preparing to refer the matter to the IRS criminal division. Both Greve and his attorney submitted affidavits in support of Greve's pre-trial motions to establish, *inter alia* that Greve provided information to the IRS and answered questions based on his clear understanding that he was cooperating in a civil audit the sole purpose of which was to ascertain his civil tax liability and that he never would have provided any of the information he gave to the IRS during that audit had he known that it was being used principally to further a criminal fraud investigation.

The IRS Special Agent assigned to develop the criminal case against Greve re-traced the precise steps taken by the RA and the IRS District Fraud Coordinator during the purported civil audit of Greve and used that very same information to expand the criminal investigation. The government ultimately employed the exact same factual theory developed by the RA and the IRS District Fraud Coordinator during the IRS' purported civil audit of Greve as its main theory of prosecution.

Greve filed pre-trial motions seeking, among other things, to dismiss the indictment, to suppress evidence, to conduct discovery for an evidentiary suppression hearing, and for an evidentiary suppression hearing based upon the IRS' alleged bad faith investigatory conduct on the grounds

that it unconstitutionally continued to conduct a civil audit of Greve long after it obtained substantial firm indications of criminal fraud sufficient to require it constitutionally to cease its civil audit activities. In response to Greve's pre-trial motions, the government submitted neither affidavits from the IRS agents involved in the Greve audit to attest to the good-faith nature of their conduct, nor any substantive evidence to oppose Greve's pre-trial motions. As a result, the preliminary, yet specific, detailed and material facts supporting Greve's allegations of intentional unconstitutional conduct stood un-rebutted.

On December 12, 2005, the district court deemed as true all of the specific, detailed, and material facts supporting Greve's allegations of the IRS' intentional unconstitutional investigation of him yet denied Greve's pre-trial motions without allowing discovery or conducting an evidentiary suppression hearing. On April 20, 2006, Greve entered a conditional guilty plea to Count IV of the indictment pending an appeal of the district court's order denying his pre-trial motions. On July 27, 2006, Greve was sentenced and judgment was entered. Greve filed his notice of appeal on August 3, 2006.

REASONS FOR GRANTING THE PETITION

Whether the IRS violates taxpayers' Fourth and Fifth Amendment rights during the course of a civil tax audit, and under what circumstances taxpayers have the ability to obtain discovery and are provided the opportunity to conduct an evidentiary suppression hearing to determine whether the IRS conducted an unconstitutional criminal investigation under the guise of a civil audit, are important questions

implicating all taxpayers' constitutional rights and on which the Seventh Circuit has now sanctioned a substantial departure from the accepted and usual course of judicial proceedings all of which supports the exercise of this Court's supervisory powers and on which this Court's guidance is urgently warranted.

Specifically, the Seventh Circuit has vitiated longstanding federal law requiring the dismissal of indictments and/or the suppression of evidence obtained by the IRS during the course of civil tax audits through intentional bad-faith deceptive and unconstitutional investigatory practices by conducting criminal investigations under the auspices of civil tax audits in the very manner in which the IRS acted here, *i.e.*, by making affirmative misrepresentations of the nature of the audit, deceptively responding to direct inquiries about the nature of that investigation, falsely promising a civil resolution of the audit in return for the unwitting and thus involuntary waiver of a taxpayer's constitutional rights and employing administrative measures to obtain third-party documents long after the IRS abandoned any civil purpose for requesting such documents.

Perhaps more importantly, the Seventh Circuit's opinion affirming the district court's order to deny Greve's pre-trial motions without discovery or conducting an evidentiary suppression hearing ignores and values at zero the important constitutional check on law enforcement activities provided by allowing defendants to challenge government investigative actions through motions to suppress evidence, discovery on those motions and evidentiary hearings on the factual issues raised in such motions. Indeed, the Seventh Circuit has now empowered district courts to preempt any real examination of the IRS' investigative actions, and eliminated the need

for any substantiative fact finding, by creating a *de facto* unrebuttable presumption of the constitutionality and good-faith conduct of government agents based on factually unsupported rhetoric about the innocent intent, motives, and knowledge of government agents who are accused of committing serious constitutional violations during the course of a tax audit.

At the core of its decision, the district court denied Greve's pre-trial motions out of a concern for converting every IRS civil tax investigation into a criminal one at its outset. However, the Seventh Circuit, in affirming that order, has swung the balance between legitimate government investigatory practices, and the fundamental rights of individuals to be free from unconstitutional law enforcement activities, too far in favor of the government and vitiated completely any real Fourth and Fifth Amendment protections for taxpayers involved in IRS investigations. The IRS' investigation of Greve here was far more than a garden variety civil tax audit which ultimately evolved into a criminal tax fraud prosecution. This case involved nothing less than an intentional bad-faith investigation by the IRS; a criminal investigation being conducted under the guise of a routine civil audit; affirmative misrepresentations, both oral and written, by the IRS for the purpose of deceiving a taxpayer and his attorney into providing both oral and documentary evidence which the IRS viewed as critical to make, and which it employed to prosecute, a criminal tax fraud case against him; and the use of administrative means to obtain information well after the IRS had not only believed it had substantial firm indications of criminal fraud, but also after it had begun formal preparation of the criminal fraud referral and had abandoned, in an institutional sense, any civil

purpose for employing such administrative means and/or had made an institutional commitment to recommend prosecution.

In the final analysis, this Court should grant this petition to provide crystal clear guidance regarding the scope of the Fourth and Fifth Amendment protections afforded to taxpayers involved in IRS audits and to clarify under what circumstances such taxpayers are entitled to obtain discovery and conduct evidentiary suppression hearings to determine whether the IRS engaged in intentional bad-faith and deceptive unconstitutional investigatory practices.

I. REVIEW IS WARRANTED TO ARTICULATE A CLEAR STANDARD CONCERNING WHEN THE IRS DURING THE COURSE OF A CIVIL TAX AUDIT VIOLATES TAXPAYERS' FOURTH AND FIFTH AMENDMENT CONSTITUTIONAL RIGHTS.

It is well established that "a consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment, if the consent was obtained by fraud, deceit, trickery or misrepresentation by the [IRS] revenue agent." *See U.S. Const. Amend.* IV-V; *U.S. v. LaSalle National Bank*, 437 U.S. 298 (1978); *U.S. v. Utecht*, 238 F.3d 882 (7th Cir. 2001); *U.S. v. Peters*, 153 F.3d 445 (7th Cir. 1998); *U.S. v. Tweel*, 550 F.2d 297 (5th Cir. 1977). To establish such a constitutional violation, the taxpayer must demonstrate that IRS revenue agents made an affirmative misrepresentation about the true nature of their examination and the misrepresentation was "material" in his decision to speak with agents and/or provide them with documentary "material." *Id.* Accordingly, if IRS agents were in fact

conducting a criminal investigation under the auspices of a civil audit, then they affirmatively misrepresented the nature of their investigation. *Id.*; *U.S. v. Nuth,* 609 F.2d 228 (5th Cir. 1979) (an affirmative misrepresentation by an IRS agent that the investigation is routine when in fact it is a criminal investigation requires suppression of evidence).

District courts should conclude such a "covert criminal investigation" was ongoing, and in turn the affirmative misrepresentation required to sustain a constitutional violation, if it determines the IRS revenue agents "continued to audit defendant after they developed a firm indication of fraud." *Id.* Courts have identified several factors as relevant to determine whether IRS agents affirmatively misled a taxpayer during the course of a purported civil audit, including, among others: (1) failure to advise a tax payer of the obvious criminal nature of the investigation; (2) a misrepresentation of the possibility of a criminal referral in order to obtain information for use in the fraud investigation; (3) active involvement by a criminal investigator in a civil audit prior to a criminal referral being made; (4) a continuation of audit activities after the agent begins preparation of the criminal fraud referral; and (5) an agent's continuing civil investigation in the face of firm indications of fraud. *See Peters*, 153 F.3d 453-54; *Tweel*, 550 F.2d at 299-300.

Here, there was preliminary, yet substantial, evidence to establish all of these factors that the IRS conducted a "covert criminal investigation" and made the requisite affirmative misrepresentations to Greve legally sufficient to find a serious constitutional violation by continuing to audit Greve after it developed substantial firm indication of criminal fraud, *i.e.*, that the IRS conducted an unconstitutional bad faith deceptive

investigation by failing to advise Greve of the obvious criminal nature of the investigation, by actively involving a criminal investigator in the civil audit process, continuing its civil audit activities after it obtained not only firm but obvious indications of criminal fraud, actual deception about the nature of the IRS' investigation and false promises of the nature of that investigation in order to wrongfully obtain evidence from Greve.

The Seventh Circuit, however, affirmed the district court's order on the grounds that the IRS could not violate Greve's constitutional rights, notwithstanding the fact that it was conducting a covert criminal investigation under the guise of a civil audit, unless its agents "pretend[ed]" to be Assistant United States Attorneys assuring Greve that he will not be prosecuted if he cooperates with the investigation. *See Appendix* A. p. 10a. Initially, the undisputed evidence deemed as true in this matter firmly established that the IRS made those very kind of unconstitutional promises to Greve to procure his cooperation with the audit *i.e.*, the IRS falsely promised Greve in order to obtain his cooperation with the audit that the audit would be "wrapped up," "done," "concluded" and that there would be no criminal referral upon the provision of the additional information it was seeking while the IRS knew that those statements were false given that it was simultaneously developing a criminal fraud case against Greve and preparing to refer the matter to the IRS criminal division.

The Seventh Circuit's opinion – sanctioning, for Fourth and Fifth Amendment purposes, a covert criminal investigation of a taxpayer during the course of a civil tax audit absent evidence that the IRS investigating agent "pretend[ed]" to be an Assistant United States Attorney

promising no prosecution of the taxpayer if he cooperates with the investigation – is in direct conflict with the Fifth Court of Appeals decision in *U.S. v. Tweel*, 550 F.2d 297 (5th Cir. 1977), and others, in which courts have held that IRS agents violate taxpayers constitutional rights by misrepresenting the obvious criminal nature of the investigation in order to procure cooperation with an investigation. Any standard holding that the IRS could not possibly violate taxpayers' Fourth or Fifth Amendment constitutional rights absent evidence that the agent "pretended" to be an Assistant United States Attorney ignores the reality that sophisticated IRS agents know better than to ever "pretend" to be Assistant United States Attorneys and completely disregards serious unconstitutional misrepresentations made by IRS agents, like the ones at issue here, designed solely to coerce taxpayers into involuntarily waiving their constitutional rights which conflicts directly with the fundamental purpose and guarantees provided by the Fourth and Fifth Amendments. *See Beckwith v. U.S.*, 425 U.S. 341 (1976) (recognizing that non-custodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . ." so as to violate an individual's constitutional rights); *Wong Sun v. U.S.*, 371 U.S. 471 (1963) (excluding evidence obtained in an unconstitutional search an seizure compels respect for the constitution by removing the incentive to disregard it).

To further emphasize the point, the Seventh Circuit held that the IRS did not misrepresent the nature of its investigation of Greve because the IRS was not required constitutionally to advise Greve or his attorney that it "might" refer the case to the criminal investigation division. *See* Appendix A, p. 10a. This holding, however, ignores the

undisputed facts deemed true here that the IRS was throughout its civil investigation, in fact, preparing to refer the matter to the criminal division – in other words, referral to the criminal division was not merely a possibility in this case as it likely is in every civil tax audit, it was a forgone conclusion from practically the outset of this civil audit rendering all of the statements to the contrary made by the IRS to Greve and his attorney unconstitutionally deceptive. *See U.S. v. Tweel, supra.*

The significance and impact of the Seventh Circuit's holding is underscored by its implicit endorsement of the district court's explicit holding that, as a matter of law, the IRS only continues unconstitutionally its civil audit activities after it begins the actual physical preparation of the criminal referral form itself. *See* Appendix B, pp. 17a-18a. In so holding, the Seventh Circuit adopted and endorsed a first ever bright-line test that nothing that IRS agents do before beginning the actual preparation of the actual criminal referral document could demonstrate the unconstitutional acquisition of evidence. This circular logic eliminates entirely any protections to taxpayers afforded by the Fourth or Fifth Amendment. Indeed, now, based on the Seventh Circuit's opinion, the IRS could never violate the constitution in gathering evidence for a criminal prosecution since it will simply conduct civil tax audits of any potential criminal defendants, shield all of its actions from judicial scrutiny by delaying beginning the actual physical preparation of the criminal referral itself until the end of its investigation, and assert in response to constitutional challenges to its conduct during the investigation that all of the evidence gathered prior to the preparation of the criminal referral was done merely an effort to ensure that sufficient evidence existed to make the referral.

1050 (3rd Dist. 1996) (conducting pre-trial evidentiary suppression hearing "more prudent" and "better practice" where there were conflicting affidavits regarding the nature of the government's investigative conduct); *U.S. v. Millman*, 822 F.2d 305 (2nd Dist. 1987) (the motivation of the IRS agent involved may be relevant to the determination of the constitutionality of the IRS' posture); *U.S. v. Genser*, 595 F.2d 146 (3rd Cir. 1979) (same). Taxpayers are now unable to challenge the good-faith conduct of IRS agents in a civil tax investigation if district courts adopt an un-rebuttable presumption that IRS agents act in good-faith in the complete absence of any submission by the government to rebut allegations of unconstitutional conduct nor the opportunity to develop during discovery or cross-examination of the IRS agents themselves what they knew about the investigation and when they knew it.

At the very minimum, the district court should have permitted discovery and held an evidentiary hearing to resolve the key factual dispute emanating from the parties' markedly different versions of events: whether the IRS acted in good-faith during the course of its audit activities. Evidentiary hearings are, by their very nature, designed to elicit the underlying facts when a defendant challenges the purported good faith of investigating agents to determine whether their conduct rose to the level of constitutional violations.

In sum, Greve should have been able to test the government's assertion of the IRS' purported good faith through examination of witnesses and receipt of relevant discovery. The Seventh Circuit's substantial limitation on the important check on law enforcement activities established by conducting evidentiary suppression hearings presents a substantial legal issue justifying Supreme Court review.

CONCLUSION

For all of the above reasons, petitioner James Greve respectfully requests that this Court grant review in this matter.

Respectfully submitted,

SHELLY B. KULWIN
KULWIN, MASCIOPINTO
& KULWIN, LLP
161 North Clark Street
Suite 2500
Chicago, IL 60601
(312) 641-0300

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 4, 2007

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-3127.

UNITED STATES of America,

Plaintiff-Appellee,

v.

James F. GREVE,

Defendant-Appellant.

Argued: April 13, 2007.

Decided: June 4, 2007.

Before FLAUM, MANION, and WOOD, Circuit Judges.

FLAUM, Circuit Judge.

A grand jury indicted James Greve on four counts of income tax offenses all in violation of 26 U.S.C. § 7206(1). Greve filed a motion to dismiss the indictment and/or suppress evidence, alleging that the Internal Revenue Service ("IRS") violated his Fourth and Fifth Amendment rights by conducting a covert criminal investigation under the guise

of a civil audit. The district court denied Greve's motion, stating that the facts reflected a "typical IRS civil investigation that ultimately led to a criminal referral." Greve appeals. For the following reasons, we affirm the district court's judgment.

I. Background

James Greve took over Greve Construction, the family business, in 1990 and converted it into a commercial snow plowing company for shopping centers, school districts, and other municipal entities. Until early 2000, Greve operated his business without an accountant and kept track of business income and expenses through billing invoices and expense receipts. Through 1999, Greve prepared his own federal and state income tax returns, employing a hybrid cash and accrual method of reporting income.

On June 28, 1999, the IRS began a civil audit of Greve's 1997 federal income tax return. Greve contacted revenue agent Ramona Luke and scheduled a meeting for August 5, 1999; however, Greve missed the scheduled appointment. On August 5, 1999, Luke issued Greve an examination report and proposed to add $143,023 in additional income to his 1997 taxable income and assessed an additional $68,383 in taxes, interest and penalties. On September 2, 1999, Greve and Luke met, and Greve admitted that he had omitted $107,888 of income in 1997. Luke determined that Greve kept inadequate books and records and employed unacceptable accounting procedures. Additionally, Greve told Luke that he and his wife had recently hired an accountant to prepare their future income tax returns.

Appendix A

Immediately following the September 2, 1999 interview, Luke mailed Greve an IRS Information Document Request ("IDR") seeking bank records that would reflect unreported gross receipts. On September 24, 1999, Greve turned over the requested bank deposit records.

On January 13, 2000, Luke began reviewing her file on Greve. On January 31, 2000, Luke reviewed the documents that Greve gave her and noted that some of the documents appeared to have been altered and that she did not have all of Greve's account information. On February 1, 2000, Luke noted that she needed to discuss the case with her group manager, Margaret Songer, and that Greve's case potentially involved fraud as opposed to merely an understatement of income.

On March 9, 2000, Luke met with Songer, who agreed that the case "may have fraud potential." Songer set up a meeting between Luke and the IRS District Fraud Coordinator, Michael Welu. The Fraud Coordinator helps develop potential fraud cases and instructs revenue agents and tax auditors how to investigate cases that may involve civil fraud or result in a criminal referral to the IRS Criminal Investigation Division ("CID").

On March 28, 2000, Welu and Luke met for seven hours about the Greve audit. During that meeting, Welu suggested that Luke expand the audit to include the 1998 tax year, obtain the 1996 tax year returns, and confirm whether Greve altered the documents he gave Luke. Welu directed Luke to issue administrative summonses to Greve's banks because they could assist in determining whether Greve had any hidden accounts.

Appendix A

On March 29, 2000, Luke contacted Greve and requested additional documents and another interview. She also advised Greve that she would be issuing him an IDR for tax years 1997 and 1998. During that conversation, Greve told Luke that he only reported income from customers who did not issue him an IRS Form 1099 and claimed that he did this because the IRS already knew about the income reported on the 1099 forms. After the conversation ended, Luke wrote a note reminding herself to determine whether Greve had altered the documents he previously provided.

On March 30, 2000, Welu informed Luke that Greve had been involved in several large cash transactions, possessed a previously undisclosed bank account, and had transferred his home into a trust shortly after the IRS audit began. Luke faxed Welu her proposed IDR for the 1997-1998 tax years for his review and approval. On April 4, 2000, Luke spent six hours reviewing Greve's file. She prepared an Examination Request for tax year 1998, seeking permission to expand the audit to include that year. The stated reasons for the request were "recurring issue" and "develope [sic] for fraud." Luke also prepared a request for tax year 1996 for "info only."

On April 6, 2000, Luke gave Greve the IDR she prepared with Welu for the 1997-1998 tax years and faxed Songer the previously prepared examination request. Luke also told Songer that she still had "to develop the fraud case" against Greve. On April 19, 2000, Luke prepared administrative summonses and retrieved IRS information on Greve's 1996 and 1998 tax returns.

Appendix A

On May 5, 2000, Greve requested additional time to produce his records. He told Luke that he was overwhelmed by the number of documents she requested and did not know how to organize them. Luke told Greve how to organize the records and gave him more time to gather them. On May 8, 2000, Greve called Luke to tell her that he had retained an attorney, Christopher Saternus. Saternus requested more time to gather Greve's documents. On June 15, 2000, Luke noted that she could not proceed with the audit until she received the requested documents from Greve, so she called Saternus and told him that she needed the documents to proceed with her examination.

On July 10, 2000, Greve called Luke to discuss the document request. He informed her that he had requested his customers' cancelled checks from his bank but did not have all of them. Luke told Greve that the records were due by July 20, 2000.

On July 20, 2000, Luke met with Saternus and Greve. Saternus asked whether Luke would be able to wrap up the audit for the years in question after she received the requested documents. Luke responded that there would be additional taxes, interest, and penalties and that the audit would be "wrapped up pretty quickly" after their meeting upon final review and determination. Greve and Saternus gave Luke all of the requested documents and acknowledged that Greve had understated his income in 1997 and 1998 by approximately $245,000.

Between July 20, 2000 and October 17, 2000, Luke continued her review of Greve's records. On October 2, 2000,

Luke advised Songer that she had completed the majority of the work involved in determining the gross receipts but that she had learned of a new bank account in Greve's wife's name. The following day, Greve called Luke and inquired about the audit's status. Luke told Greve that she needed the documents on the newly-discovered bank account and that she might ask Greve for an extension of the civil statute of limitations.

On January 23, 2001, after discussing the audit with Welu, Luke downloaded the IRS fraud handbook. Luke's notes from the following day indicate that she needed to conclude the audit and either "write up referral or close agreed." On January 25, 2000, Luke noted that she needed to set an appointment with Welu to complete the referral of the criminal fraud case. The next day, Luke scheduled a meeting with Welu to "write fraud referral." On February 15, 2001, Luke and Welu met to discuss the status of the audit. Welu told Luke that she could not refer the matter to CID because she needed to be able to show that Greve made an "overt action." Welu instructed Luke to contact Greve's customers to determine why they did not issue him 1099 forms for work he performed for them. Welu and Luke also discussed the applicable statute of limitations for civil assessment. Welu noted that because Greve omitted over 25% of income, the statute could be extended. Luke contacted several of Greve's customers and requested information regarding their payments to him.

On March 23, 2001, Luke met with Welu for another six hours. Following that meeting, Luke wrote up her CID referral report, which noted that Greve filed a "W-9 with

several customers claiming that he was incorporated when he was in fact not. These customers issued no 1099's [sic]." On March 26, 2001, Songer e-mailed Welu asking about the referral's status. Welu e-mailed Songer that the referral had been made. Songer then e-mailed Luke with the news, stating, "O ye of little faith." On April 2, 2001, Special Agent Mark Johnson met with Luke, Welu, and Songer to discuss the case.

On March 29, 2005, a federal grand jury indicted Greve on four income tax offenses, alleging violations of 26 U.S.C. § 7206(1). Count One charged Greve with failing to report $158,539 in gross receipts in his personal tax return for tax year 1998. Count Two charged Greve with failing to report $201,736 in gross receipts in his personal tax return for tax year 1999. Count Three charged him with failing to report $388,365 in gross receipts in a tax return for Greve Construction, Inc. for tax year 2000. Count Four charged Greve with claiming a false S corporation loss and a false refund in his personal income tax return for tax year 2000.

Greve filed a motion to dismiss the indictment and/or suppress evidence, alleging that the IRS had unconstitutionally obtained statements and documents for him by conducting a civil audit of Greve after it had "firm indications of fraud." Greve also filed a motion for leave to conduct discovery and requested an evidentiary hearing on his initial motion. On December 12, 2005, the district court, accepting as true all of the facts alleged by Greve, denied the motions, finding that the facts reflected a "typical IRS civil investigation that ultimately led to a criminal referral." Greve appeals.

Appendix A

II. Discussion

A. Motion to Dismiss the Indictment

Greve contends that the district court erred by denying his motion to dismiss the indictment because the IRS presented illegally obtained evidence to the grand jury. This Court reviews questions of law in a district court's ruling on a motion to dismiss an indictment de novo. *United States v. Peters,* 153 F.3d 445, 451 (7th Cir.1998). It reviews factual findings for clear error. *Id.* The Supreme Court has held that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . , if valid on its face, is enough to call for a trial on the merits." *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956). The Court's reluctance to examine the quality or sufficiency of the evidence presented to a grand jury extends even to unconstitutionally obtained evidence. *See United States v. Calandra,* 414 U.S. 338, 344-45, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (stating that "an indictment valid on its face is not subject to challenge on the ground that . . . the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination"). Accordingly, even if the grand jury examined illegally obtained evidence, the district court did not err by denying Greve's motion to dismiss the indictment.

B. Motion to Suppress

Greve next argues that the district court erred by denying his motion to suppress because the IRS obtained evidence against him in violation of his Fourth and Fifth Amendment

rights by conducting a covert criminal investigation under the guise of a routine civil audit. We review questions of law in a district court's ruling on a motion to suppress de novo. *Peters,* 153 F.3d at 451. We review factual findings for clear error. *Id.*

Greve contends that Luke affirmatively misled him by continuing to conduct a civil audit after she had firm indications of fraud. *See United States v. Serlin,* 707 F.2d 953, 956 (7th Cir.1983) (stating that a defendant seeking suppression must produce clear and convincing evidence that the agents affirmatively misled him as to the true nature of their investigation). Although the IRS regulations require a civil investigator to cease her investigation when she has developed firm indications of fraud, *see* Internal Revenue Manual §§ 4565.21(1), 9311.83(1), we have held that "[a] failure to terminate a civil investigation when the revenue agent has obtained firm indications of fraud does not, without more, establish the inadmissibility of evidence obtained by [the agent] in continuing to pursue the investigation." *United States v. Kontny,* 238 F.3d 815, 820 (7th Cir.2001). Indeed, "[p]roof of deceit must be linked up to the constitutional standard of threat or promise." *Id.* at 819. In other words, Greve must prove that Luke induced his compliance through false promises.

Greve maintains that Luke made false promises to him by repeatedly advising him that his cooperation would result solely in a civil tax assessment. Greve first identifies a July 10, 2000 phone conversation, in which Greve called Luke to tell her that he was having difficulty obtaining all of the cancelled checks, and Luke told him not to worry because

the records were due on July 20, 2000. Greve contends that "clearly, Luke [wa]s promising Greve that the case would be concluded if he provided his deposit records and further cooperated on July 20, 2000." We disagree. We have stated that an inappropriate promise might occur if an agent "pretend[s] to be an Assistant U.S. Attorney and assure[s] [the taxpayer that he] w[ill] not be prosecuted if [he] cooperate[s]." *Kontny,* 238 F.3d at 819. However, no such affirmative promise occurred during this conversation. Rather, it dealt solely with the timing of Greve's compliance with an IDR.

Next Greve points to the meeting on July 20, 2000 between Luke, Saternus, and Greve at the IRS's office. Saternus asked whether Luke would be able to wrap up the audit for the years in question once she received the requested documents. In response, Luke stated that upon review and final determination, there would be additional tax due, plus interest and penalties, but that it should be wrapped up following the meeting. Greve maintains that Luke's response was a promise not to refer the case to CID and to proceed in a civil manner only. Again, there was simply no such promise. In fact, Luke qualified her statement by saying that any decisions were dependant upon review and final determination. Although Luke did not inform either Saternus or Greve that she might refer the case to CID for a criminal investigation, she was not required to do so. *See Serlin,* 707 F.2d at 956 (stating that "[s]imple failure to inform the defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit"). Consequently, the district court did not err by denying Greve's motion to suppress.

C. Evidentiary Hearing

Greve argues that the district court erred by denying his motion for an evidentiary hearing. This Court reviews a district court's denial of an evidentiary hearing for an abuse of discretion. *United States v. Juarez,* 454 F.3d 717, 719 (7th Cir.2006). To obtain an evidentiary hearing on his motion to suppress, Greve was required to "provide sufficient information to enable the court to conclude that a substantial claim [wa]s presented and that there [we]re disputed issues of material fact which w[ould] affect the outcome of the motion." *Id.* at 720. In ruling on Greve's motion to suppress, the district court accepted Greve's factual assertions as true. Because the government did not dispute the facts of the IRS investigation as relayed by Greve, the district court had no need to make a credibility determination. Consequently, the district court did not abuse its discretion by denying Greve's motion for a hearing.[1]

III. Conclusion

For the above reasons, we Affirm the district court's judgment.

---

1. Greve also claims that the district court erred by denying his motion for further discovery. However, because the district court properly denied Greve's motion to dismiss and motion to suppress, we need not address his challenge to the district court's denial of his motion for additional discovery. *See Larkin v. Galloway,* 266 F.3d 718, 724 (7th Cir.2001).

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION DECIDED DECEMBER 12, 2005

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

No. 05 CR 50031

UNITED STATES of America,

Plaintiff,

v.

James F. GREVE,

Defendant.

Decided: December 12, 2005

REINHARD, District Court Judge.

For the reasons set forth below, the court denies defendant's motion for discovery, motion to dismiss and/or suppress, and the request for an evidentiary hearing.

Defendant, James F. Greve, who has been indicted for tax fraud, filed a motion to dismiss and/or suppress evidence based on his contention that the evidence to be used against him was gathered pursuant to a bad faith investigation. In

his motion, he also requests an evidentiary hearing. Related to the motion to dismiss/suppress, defendant has also filed a motion seeking disclosure by the government of certain materials. Both motions are fully briefed.[1]

As a initial matter, the court find that it can rule on the motion to dismiss/suppress without conducting an evidentiary hearing because, accepting defendant's factual assertions as true, defendant has not shown any entitlement to relief. Further, as the court will discuss later, defendant has not met the test that would justify additional disclosure from the government.

There can be no doubt that the controlling case in the Seventh Circuit is *United States v. Peters*, 153 F. 3d 445 (7th Cir. 1998), which reiterates the applicable standard governing defendant's motion to dismiss/suppress and additionally elaborates on the various considerations relevant to that standard.[2] Thus, this court begins its analysis with that case.

A consensual search is unreasonable under the Fourth Amendment and/or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery, or misrepresentation.[3] *Peters*, 153 F. 3d. at 451. To

1. The court notes the excellent briefs submitted by both parties.

2. While the parties have a some disagreement over the applicable standard, that disagreement appears to be mostly semantical. Nonetheless, the standard is clearly set forth in *Peters*.

3. As in *Peters*, defendant here seeks to suppress both statements and documentary evidence. Because his constitutional claims depend on a showing of fraud, deceit, trickery, or misrepresentation, it is not necessary to discuss each claim separately. See *Peters*, 153 F. 3d at 451 n. 8.

prevail, a defendant must show, by clear and convincing evidence, that: (1) the IRS agents affirmatively misled him as to the true nature of their investigation; and (2) the alleged misinformation materially caused him to provide information to the agents. *Peters*, 153 F. 3d at 451. Simple failure to inform a defendant that he is the subject of the investigation, or that the investigation was criminal in nature, does not amount to deceit unless the defendant inquired about the investigation and the agent's failure to respond was intended to mislead. *Peters*, 153 F. 3d at 451.

The *Peters* court further identified the following considerations relevant to whether the IRS agents affirmatively misled a defendant: (1) a failure to advise a defendant of the obvious criminal nature of the investigation; (2) a misrepresentation of the possibility of a criminal referral in order to obtain information for use in the fraud investigation; (3) an active involvement by a criminal investigator in a civil audit prior to a criminal referral being made; (4) a continuation of audit activities after the revenue agent begins preparation of the criminal fraud referral; and (5) a revenue agent continuing with the investigation in the face of firm indications of criminal fraud. *Peters*, 153 F. 3d at 453-54.

Additionally, the court of appeals mentioned several considerations that inform the question of whether a firm indication of fraud exists in a given case. One is whether there is a consistent pattern of substantial under reporting of income or overstatement of deductions such that intent to evade can be inferred. *Peters*, 153 F. 3d at 455. Another is the need to recognize that revenue agents who discover

potential violations of the tax laws will typically give a taxpayer an opportunity to explain before deciding to refer the matter or not. *Peters*, 153 F. 3d at 455. Put another way, a revenue agent's exploration of the case with the taxpayer in an effort to assess the taxpayer's state of mind is critical to determining if there are firm indications fo fraud in a given case. Finally, a firm indication of fraud should be distinguished from a "first indication of fraud." The latter being mere suspicion that justifies further investigation. *Peters*, 153 F. 3d at 455-56.

Before applying the standard and its relevant considerations to this case, the court emphasizes that the ultimate question is whether the IRS agents affirmatively misled defendant such that it materially caused him to provide information that he would not have otherwise provided. In doing so, no one consideration, including firm indications of fraud, is controlling. See *Peters*, 153 F. 3d at 456.

Viewing all of the factual assertions relied on by defendant as true, defendant has not met the standard in this case. In that regard, the court is compelled to characterize the nature of this case. The facts reflect a typical IRS civil investigation that ultimately led to a criminal referral. Like most such situations, it cannot be viewed with hindsight. The revenue agent in this case began her civil investigation as part of a tax audit. As she did so, she naturally obtained additional evidence, some of which apparently caused her to suspect that criminal fraud may have been committed. Reflecting those initial suspicions, she had discussions with her supervisor and the fraud coordinator, both with whom she should have had such discussions to do her job properly.

There is no indication that either of those individuals directed her to conduct a criminal investigation under the guise of a civil one.

Obviously, like any civil tax investigation, the investigator attempted to determine the extent of the civil liability. In doing so, evidence of criminal liability began to emerge. At that point, the revenue agent was required to ascertain whether her case continued to be civil or had become criminal in nature. Such a determination necessarily requires additional investigation lest every run of the mill civil case with some indication of criminality would get referred as criminal. The line is admittedly a very gray one and even more so from the perspective of the revenue agent at the time she is engaged in the process. The court further notes that it is not unnatural for a defendant to speculate about the true intention of the revenue agent in light of the mistrust one might generally have for a large governmental agency charged with collecting taxes. These competing concerns are why there must be clear and convincing evidence of such bad faith or evil intent to take advantage of the tax payer before a court will disrupt the process of an administrative agency such as the IRS. Defendant has failed to establish such evidence in this case.

Looking at the relevant considerations delineated by the Seventh Circuit, defendant has not shown that there was a failure to advise him of the obvious criminal nature of the investigation prior to it being referred criminally. As discussed above, the case was simply not criminal in nature until the time it was referred and certainly not obviously so before that time.

Appendix B

Defendant has also not shown any misrepresentation regarding a referral in this case with any intent to obtain further information from him. While he complains of the vague responses by the revenue agent during the July 20, 2000, meeting, the questions posed were equally vague and did not command anymore specific of a response. They also may very well have not been interpreted as direct queries about possible criminal referral. Further, the lack of any comment by the agent in the absence of any questions does not evidence any intent to mislead under the facts of this case.

There is also no evidence of any active involvement by any criminal investigator in the revenue agent's case. While defendant makes much of the interaction between revenue agent Luke and Welu, Welu was the fraud coordinator whose job duties included providing advice and input to a revenue agent whose investigation was arguably hinting at criminal fraud. Welu's role in this case was clearly not one of a criminal investigator directing Luke's actions for the purpose of garnering evidence for a criminal prosecution.

Nor has defendant shown a continuation of civil audit activities after the revenue agent began her preparation of the criminal fraud referral. While preparation, taken to its logical extreme, could be interpreted to include the first conduct by Luke that eventually led to completion of the referral, the court will not give it so broad a meaning for fear of converting every civil investigation into a criminal one at its outset. Rather, the court considers preparation in this context to mean the actual physical preparation of the referral itself. That being said, no significant investigative activities

were undertaken by Luke in this case after she began her preparation of the criminal referral.

That leaves the issue of whether defendant has pointed to any facts that Luke continued to investigate in the face of firm indications of criminal fraud. As noted earlier, the firm indications of fraud consideration is inherently a gray one and extremely fact intensive. Applying a reasonable person approach, as the court believes it should in light of the Fourth and Fifth Amendment challenges raised by defendant, the evidence as relied on by defendant does not support his claim that there were firm indications of fraud during any of the time Luke was actively engaged in conduct related to her fraud investigation. Moreover, to the extent the evidence in this case arguably suggests firm indications of fraud existed prior to the referral, it is so inconclusive that it simply is not significant enough to allow this court to conclude that Luke affirmatively misled defendant.

Having applied the standard and all relevant considerations as outlined by the court of appeals, the court finds that defendant has not shown by clear and convincing evidence that Luke or any other IRS representative affirmatively misled defendant as to the true nature of the investigation. That being the case, the court also concludes that no colorable basis has been shown to justify further discovery as it relates to defendant's motion to dismiss/ suppress. For these reasons, the court denies both defendant's motion for discovery and motion to dismiss and/or suppress, and also denies his request for an evidentiary hearing.